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No. 03-388

Supreme Court, U.S.
FILED
NOV 24 2004
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In The
Supreme Court of the United States

DENNIS BATES, et al.,

Petitioners,

v.

DOW AGROSCIENCES LLC,

Respondent.

CORRECTED COPY

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF THE TEXAS CHEMICAL COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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November 24, 2004

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QUESTION PRESENTED

Which, if any, state law crop injury claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-137?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iv
Interest of *Amicus Curiae*	1
Summary of Argument	2
Argument	4
I. Because Petitioners Failed to Offer Any Proof of a Safer Alternative Design, All the Design Claims – Whether Couched in Terms of Strict Liability, Negligence, or Warranty – Fail on Their Own Terms	5
A. Regardless of the Form of the Pleadings, All Design Defect Claims Require Proof of the Same Elements	6
B. Design Defect Claims Require Proof of a Safer Alternative Design	7
C. Petitioners Have Offered No Evidence of a Safer Alternative Design, Underscoring That the Substance of Their Claims Is Label-Based	8
II. Any Pre-Sale References to an "Excellent" Product Are Non-Actionable "Puffing" Under Texas Law	10
A. "Puffing" Is Not Actionable Under Texas Law	12
B. References to an "Excellent" Product Are Classic Puffing	13

TABLE OF CONTENTS – Continued

	Page
III. The Alleged Post-Sale Statements Are Not Actionable	16
Conclusion	20

TABLE OF AUTHORITIES

Page

CASES

Acord v. General Motors Corp., 669 S.W.2d 111 (Tex. 1984) 8

Aetna Health Inc. v. Davila, 124 S. Ct. 2488 (2004) 4

American Tobacco Co. v. Grinnell, 951 S.W.2d 420 (Tex. 1997) 10, 18

Andrus v. Agrevo USA Co., 178 F.3d 395 (5th Cir. 1999) 4

Autohaus, Inc. v. Aguilar, 794 S.W.2d 459 (Tex. App. – Dallas 1990), *writ denied per curiam*, 800 S.W.2d 853 (Tex. 1991) 13

Barber v. Grande Truck Centre, Inc., 2002 WL 31253387 (Tex. App. – San Antonio 2002, pet. denied) 14

Bradford v. Vento, 48 S.W.3d 749 (Tex. 2001) 16

Caterpillar, Inc. v. Shears, 911 S.W.2d 379 (Tex. 1995) 8

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 8

Chandler v. Gene Messer Ford, Inc., 81 S.W.3d 493 (Tex. App. – Eastland 2002, pet. denied) 12

Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) 4

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 2

Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939) 8

Compaq Computer Corp. v. LaPray, 135 S.W.3d 657 (Tex. 2004) 20

TABLE OF AUTHORITIES – Continued

Page

Douglas v. Delp, 987 S.W.2d 879 (Tex. 1999) 13

Dowling v. NADW Marketing, Inc., 631 S.W.2d 726 (Tex. 1982) 12

Eagle Props., Ltd. v. KPMG Peat Marwick, 912 S.W.2d 825 (Tex. App. – El Paso 1995, writ denied) 17

Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co., 51 S.W.3d 573 (Tex. 2001) 17

Formosa Plastics Corp. U.S.A. v. Presidio Engineers & Contractors, Inc., 960 S.W.2d 41 (Tex. 1998) 18, 19

Geier v. American Honda Motor Co., 529 U.S. 861 (2000) 2

General Motors Corp. v. Sanchez, 997 S.W.2d 584 (Tex. 1999) 7

Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559 (1st Cir. 1996) 4

Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 8

Haase v. Glazner, 62 S.W.3d 795 (Tex. 2001) 17, 19

Helena Chem. Co. v. Wilkins, 47 S.W.3d 486 (Tex. 2001) 12, 13, 15, 16

Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675 (Tex. 2002) 18

Hernandez v. Tokai Corp., 2 S.W.3d 251 (Tex. 1999) 8

Humble Nat'l Bank v. DCV, Inc., 933 S.W.2d 224 (Tex. App. – Houston [14th Dist.] 1996, writ denied) 13, 14

Hyundai Motor Co. v. Rodriguez, 995 S.W.2d 661 (Tex. 1999) 6

TABLE OF AUTHORITIES – Continued

Page

Johnson v. Monsanto Chem. Co., 129 F. Supp. 2d 189 (N.D.N.Y. 2001) 4

Kessler v. Fanning, 953 S.W.2d 515 (Tex. App. – Fort Worth 1997, no pet.) 13

Kuiper v. American Cyanamid Co., 131 F.3d 656 (7th Cir. 1997) 4

Larsen v. Carlene Langford & Assoc., 41 S.W.3d 245 (Tex. App. – Waco 2001, pet. denied) 12

McManus v. Fleetwood Enterprises, Inc., 320 F.3d 545 (5th Cir. 2003) 18

Munters Corp. v. Swissco-Young Indus., Inc., 100 S.W.3d 292 (Tex. App. – Houston [1st Dist.] 2002, pet dism'd) 12

Netland v. Hess & Clark, Inc., 284 F.3d 895 (8th Cir. 2002) 4

Papas v. Upjohn Co., 985 F.2d 516 (11th Cir. 1993) 4

Pennington v. Singleton, 606 S.W.2d 682 (Tex. 1980) 14, 15

Prudential Ins. Co. v. Jefferson Assoc., Ltd., 896 S.W.2d 156 (Tex. 1995) 12, 14

Quest Chem. Corp. v. Elam, 898 S.W.2d 819 (Tex. 1995) 9

Schindler v. Austwell Farmers Co-op., 841 S.W.2d 853 (Tex. 1992) 19

Taylor AG Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) 4

Transport Ins. Co. v. Faircloth, 898 S.W.2d 269 (Tex. 1995) 12

Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853 (2nd Cir. 1918) 11

TABLE OF AUTHORITIES – Continued

Page

Welchert v. American Cyanamid Co., 59 F.3d 69 (8th Cir. 1995) 4

Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) 4

STATUTES

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* 1, 4

TEX. BUS. & COM. CODE § 2.313(a) 19

TEX. BUS. & COM. CODE § 2.313(b) 11

TEX. BUS. & COM. CODE § 17.46(b)(5) 13

TEX. BUS. & COM. CODE § 17.46(b)(7) 13

TEX. BUS. & COM. CODE § 17.50(a) 12

TEX. CIV. PRAC. & REM. CODE § 82.001 *et seq.* 6

TEX. CIV. PRAC. & REM. CODE § 82.001(2) 6

TEX. CIV. PRAC. & REM. CODE § 82.005(a)(1) 7, 8

TEX. CIV. PRAC. & REM. CODE § 82.005(b) 7

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF TORTS § 402A 6

RESTATEMENT (SECOND) OF TORTS § 542 cmt. e 11, 14

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n 6

INTEREST OF *AMICUS CURIAE*

Texas Chemical Council (TCC) respectfully files this brief as *amicus curiae*.[1]

TCC is a statewide trade association of businesses operating chemical manufacturing facilities in Texas. TCC has approximately 90 member companies, which operate more than 200 facilities. Texas is the nation's largest producer and exporter of chemical products. Chemical products made by Texans, valued at almost $15 billion dollars annually, are shipped to other countries around the world. In total, chemical products made by Texans are valued at almost $72 billion dollars annually.[2]

In representing the chemical industry, TCC advocates for regulation of the chemical industry based on sound science with clear and cost-effective benefits.[3] TCC has an interest in the question presented by this case because the scope of federal preemption under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (FIFRA), directly affects the mission of TCC: To create a globally competitive environment for the chemical industry in Texas in a manner that is positive for the state and its people.

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[1] The following representations are made pursuant to Sup. Ct. R. 37: In blanket letters of consent filed with the Clerk, the parties have consented to the filing of *amicus* briefs in this case; no counsel for either party wrote any portion of this brief; no person other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief.

[2] http://www.txchemcouncil.org("Our Industry").

[3] http://www.txchemcouncil.org ("About TCC").

The primary purpose of preemption doctrine is to honor the Supremacy Clause. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). But there is a collateral benefit that is of greater practical importance to private industry: Preemption allows economic actors in the marketplace to regulate their conduct without the threat of conflicting legal obligations, affording certainty for actors who rely on compliance with one set of regulatory standards to protect them from the burdens and inefficiencies of varying state standards. "This policy by itself favors pre-emption of state tort suits, for the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000).

That important economic benefit is undermined if dissatisfied purchasers of chemical products can indirectly call into question federal labeling requirements simply by artfully pleading label-based claims to circumvent federal preemption. TCC respectfully submits this brief in support of the Respondent's position that, correctly understood, all the Petitioners' label-based claims are preempted.

SUMMARY OF ARGUMENT

I. Petitioners' strict liability claims and negligent testing, development, and manufacturing claims are rooted in the allegation that Respondent's herbicide was defectively designed. Under Chapter 82 of the Texas Civil Practice and Remedies Code, every design defect claim must establish the existence of a "safer alternative design."

The statute governs every design defect claim, regardless of form, and it spells out in detail the precise meaning of "safer alternative design" under Texas law.

In this case, Petitioners failed to offer any evidence of a safer alternative design when they were given the opportunity to do so in the district court. Therefore, the courts below properly determined that each of Petitioners' purported design defect claims was functionally a disguised claim for failure to warn. Petitioners cannot avoid preemption by mere artful pleading. Allegations of failure to warn are quintessentially label-related and, as such, are preempted by FIFRA.

II. Petitioners' effort to escape preemption by restating their label-based complaints as off-label claims based on oral representations is equally futile. The lower courts held that these off-label claims are not materially different from the label-based claims, subjecting them to FIFRA preemption. But even if these claims were not preempted, they would not be actionable. The alleged oral representations fall within the traditional rule that mere "puffing" is not actionable. Petitioners cannot escape preemption by recasting their claims into a form that has no independent viability.

III. Finally, Petitioners' claims based on alleged post-sale promises, while not within the scope of FIFRA preemption, are not actionable. Petitioners have given no indication that they could establish the essential elements of those claims. Those claims illustrate the lengths to which Petitioners will go to escape FIFRA, but avoiding preemption on those claims will be an empty victory. The game is not worth the candle.

ARGUMENT

The principal question presented is whether the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq*. (FIFRA) preempts state-law claims based on alleged defects in product labeling. *Amicus* addresses a related question: Assuming that FIFRA preempts label-based claims arising under state law, may a litigant avoid the scope of that preemption simply by recharacterizing its claim? Put another way, can the Petitioners' claims in this case fairly be characterized as anything other than label-based claims? The answer is "no."

This Court has held "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). Litigants cannot evade federal preemption simply by relabeling their claims. *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 2498 (2004) (discussing cases). Federal courts addressing FIFRA preemption are not bound by the form of a plaintiff's complaint; they consider the substance of the complaint to determine whether it is, in fact, a label-based claim. If so, the claim is preempted.[4]

[4] *E.g.*, *Netland v. Hess & Clark, Inc.*, 284 F.3d 895, 900 (8th Cir.), *cert. denied*, 537 U.S. 949 (2002); *Andrus v. Agrevo USA Co.*, 178 F.3d 395, 400 (5th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 666 (7th Cir. 1997); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 565-66 (1st Cir. 1996); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 563 (9th Cir. 1995); *Welchert v. American Cyanamid Co.*, 59 F.3d 69, 73 (8th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 747-48 (4th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 520 (11th Cir. 1993); *Johnson v. Monsanto Chem. Co.*, 129 F. Supp. 2d 189, 195 (N.D.N.Y. 2001).

This case illustrates the wisdom of that approach. A close examination of the substance of Petitioners' claims reveals that they have no viable cause of action apart from their preempted label-based claims.

I. BECAUSE PETITIONERS FAILED TO OFFER ANY PROOF OF A SAFER ALTERNATIVE DESIGN, ALL THE DESIGN CLAIMS – WHETHER COUCHED IN TERMS OF STRICT LIABILITY, NEGLIGENCE, OR WARRANTY – FAIL ON THEIR OWN TERMS.

The Petitioners suggest that FIFRA preemption of their label-based claims would not likewise preempt their claim that Strongarm was defectively designed, which they characterize as a strict products liability theory, a negligence theory, and a breach of warranty theory. *See* Pet. Br. at 40-44, 47-48.

If there were a legitimate design defect claim, that argument might have merit. But the design defect claims asserted by Petitioners are fatally defective under Texas law: Petitioners have neither identified nor offered competent evidence of a safer alternative design, which is an essential element of any design defect claim. As a result, Petitioners' design claims – whether characterized as strict liability, negligence, or warranty – fail on their own terms. They are simply exercises in artful pleading designed to circumvent the scope of FIFRA preemption. Therefore, the court of appeals correctly concluded that this design defect claim "is functionally a disguised claim for failure to warn." Pet. App. 19a.

A. Regardless of the Form of the Pleadings, All Design Defect Claims Require Proof of the Same Elements.

Although products liability doctrine has its roots in the common law, *see, e.g.*, RESTATEMENT (SECOND) OF TORTS § 402A (1965), the Texas Legislature has acted to displace the common law by codifying specific standards that govern all products liability actions. *See* TEX. CIV. PRAC. & REM. CODE § 82.001 *et seq.* (Vernon 1997).[5] In so doing, the Legislature has mandated that these standards govern every products liability action, regardless of form:

> "Products liability action" means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

TEX. CIV. PRAC. & REM. CODE § 82.001(2). Under this statute, "the findings required to establish a design defect claim are identical, regardless of the legal theory asserted." *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664-65 (Tex. 1999). That approach reflects the mainstream view of American tort law. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. n (1998).

As a result, there is no reason to dwell on the semantic distinctions between the Petitioners' strict liability,

[5] For the Court's convenience, the relevant sections of Chapter 82 are set forth in the appendix to this brief.

negligence, and warranty claims. Because each claim is based on an alleged design defect, each claim must satisfy the standards codified in Chapter 82 of the Texas Civil Practice and Remedies Code. They do not.

B. Design Defect Claims Require Proof of a Safer Alternative Design.

In every "products liability action in which a claimant alleges a design defect," the plaintiff bears the burden of proving that "there was a safer alternative design." TEX. CIV. PRAC. & REM. CODE § 82.005(a)(1). The statute specifies a precise definition of "safer alternative design":

> In this section, "safer alternative design" means a product design other than the one actually used that in reasonable probability:
>
> (1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and
>
> (2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge.

TEX. CIV. PRAC. & REM. CODE § 82.005(b).

The "safer alternative design" requirement builds upon the traditional risk-utility test for design defect claims, under which a product is not deemed defectively designed unless it is shown to be unreasonably dangerous. *General Motors Corp. v. Sanchez*, 997 S.W.2d 584, 589 (Tex. 1999). Because a manufacturer is not required to

design the safest possible product, *Acord v. General Motors Corp.*, 669 S.W.2d 111, 114 (Tex. 1984), a design may involve some danger without being defective; only when the risk of a design exceeds its utility can the design be found defective under the risk-utility test. *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 381 (Tex. 1995).

The "safer alternative design" requirement of Chapter 82 supplements this test and makes proof of a safer alternative design a *sine qua non* of design defect law. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256 (Tex. 1999) ("Section 82.005 reflects the trend in our common-law jurisprudence of elevating the availability of a safer alternative design from a factor to be considered in the risk-utility analysis to a requisite element of a cause of action for defective design."). Petitioners cannot meet that requirement.

C. Petitioners Have Offered No Evidence of a Safer Alternative Design, Underscoring That the Substance of Their Claims Is Label-Based.

As a matter of Texas substantive law, "the burden is on the claimant to prove [the existence of a safer alternative design] by a preponderance of the evidence." TEX. CIV. PRAC. & REM. CODE § 82.005(a)(1); *see also Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10 (1945) ("in diversity cases the federal courts must follow the law of the State as to burden of proof") (citing *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939)).

Accordingly, in its motion for summary judgment, Respondent challenged Petitioners "to produce evidence in support of their claims" of defective design. R. 312; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("Rule

56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

In response, Petitioners offered only the affidavit of Dr. John M. Brown. *See* J.A. 118-127. Dr. Brown offered his opinion that respondent's herbicide "was defective as a herbicide for use in west Texas peanut fields with a soil pH of 7.0 or greater and that the defect in the product rendered the herbicide unreasonably dangerous." J.A. 126. At no point, however, did Dr. Brown address the question of a safer alternative design. By failing to offer any evidence of a safer alternative design to support their purported design defect claims, Petitioners effectively conceded that those claims actually do not constitute design defect claims as a matter of Texas law.

Petitioners' default has two consequences. First, it defeats their design claims, as a matter of law. But more important from the perspective of *Amicus* TCC, Petitioners' default illustrates that their various design claims were nothing more than artful attempts to recast what are, in substance, preempted label-based claims. Here, as in *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995), Petitioners' "*particular* strict liability and [other] claims . . . are based solely upon [the manufacturer's] failure to provide adequate warnings and instructions on its product." *Id.* at 820-21 (emphasis added). Petitioners cannot avoid preemption of these claims by recasting them as design defect claims. *Id.* By any name, Petitioners' products liability claims are label-based.

That conclusion is equally true with respect to the "negligent testing" claim, Pet. Br. at 47-48, which falls within the parameters of a marketing defect claim – not a design defect claim – as a matter of Texas substantive law. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997) (holding that a "negligent testing claim is predicated on [defendant's] duty to test and ascertain the dangers inherent in its products about which it must warn consumers"). Thus, the viability of all the Petitioners' strict liability, negligence, and warranty claims, which are inextricably label-based, must stand or fall with the Court's resolution of the preemption question.

II. ANY PRE-SALE REFERENCES TO AN "EXCELLENT" PRODUCT ARE NON-ACTIONABLE "PUFFING" UNDER TEXAS LAW.

Similarly, Petitioners cannot escape preemption of their label-based claims by restating the same allegations as misrepresentations based on pre-sale comments. Petitioners claim violations of the state consumer protection statute (the "DTPA"), breach of warranty, and fraud, based on allegations that a few of them were told the product would be "excellent." *See* Pet. Br. at 44-47. The lower courts held these claims are preempted because the alleged off-label statements were not materially different from the contents of the Strongarm label, subjecting them to the same preemption analysis as the overtly label-based claims. Pet. App. 16a-17a.

Even if the off-label claims were not preempted, they would not be actionable. Texas law distinguishes between actionable misrepresentations of fact and "puffing." The common law has long recognized that the process of selling a product in a competitive market will inevitably involve

giving the product a favorable spin: "It is common knowledge and may always be assumed that any seller will express a favorable opinion concerning what he has to sell; and when he praises it in general terms, without specific content or reference to facts, buyers are expected to and do understand that they are not entitled to rely literally upon the words." RESTATEMENT (SECOND) OF TORTS § 542 cmt. e (1977). Learned Hand nicely articulated the wisdom of the common law:

> The reason of the rule lies, we think, in this: There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.

Vulcan Metals Co. v. Simmons Mfg. Co., 248 F. 853, 856 (2nd Cir. 1918). Today, the Uniform Commercial Code reflects this traditional wisdom in its provision on express warranties, explaining that "affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." TEX. BUS. & COM. CODE § 2.313(b).

Just as the requirement of a safer alternative design applies to all allegations of design defect, this substantive rule applies to all allegations of misrepresentation. Accordingly, however their misrepresentation claims are framed

in the complaint, Petitioners cannot recover for pre-sale statements that were mere "puffing."

A. "Puffing" Is Not Actionable Under Texas Law.

The common-law rule against imposing liability for mere "puffing" is an established part of Texas fraud law. "Puffery is an expression of opinion by a seller not made as a representation of fact." *Dowling v. NADW Marketing, Inc.*, 631 S.W.2d 726, 729 (Tex. 1982). Statements of puffery or opinion are not fraud. *See, e.g., Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995) ("An actionable representation is one concerning a material fact; a pure expression of opinion will not support an action for fraud."); *Prudential Ins. Co. v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156, 163 (Tex. 1995) ("These statements were not misrepresentations of material fact but merely 'puffing' or opinion, and thus could not constitute fraud.").

Given this strong background rule, the Texas courts have interpreted the state's consumer protection statute (the DTPA) so as to preserve this historical protection for puffing. *E.g., Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 502 (Tex. 2001); *Munters Corp. v. Swissco-Young Indus., Inc.*, 100 S.W.3d 292, 298 (Tex. App. – Houston [1st Dist.] 2002, pet dism'd); *Chandler v. Gene Messer Ford, Inc.*, 81 S.W.3d 493, 501 (Tex. App. – Eastland 2002, pet. denied); *Larsen v. Carlene Langford & Assoc.*, 41 S.W.3d 245, 254 (Tex. App. – Waco 2001, pet. denied).

The DTPA affords a statutory remedy for both affirmative misrepresentations and breaches of warranty, TEX. BUS. & COM. CODE § 17.50(a), and the traditional rule against imposing liability for "puffing" applies to both

forms of action. *See, e.g., Kessler v. Fanning*, 953 S.W.2d 515, 519 (Tex. App. – Fort Worth 1997, no pet.); *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 231 (Tex. App. – Houston [14th Dist.] 1996, writ denied); *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459, 463 (Tex. App. – Dallas 1990), *writ denied per curiam*, 800 S.W.2d 853 (Tex. 1991).

This is so even though the DTPA makes no mention of protecting "puffing," and it is so in the context of the two specific statutory subsections alleged by the Petitioners as the basis for their claims. As the Texas Supreme Court explains, "The DTPA does not mention 'puffing' as a defense. However, this Court has recognized that 'mere puffing' statements are not actionable under sections 17.46(b)(5) or 17.46(b)(7)." *Helena*, 47 S.W.3d at 502 (citations omitted); *Douglas v. Delp*, 987 S.W.2d 879, 886 (Tex. 1999) ("These subsections are intended to protect consumers against misrepresentations of material fact; statements of opinion alone are generally insufficient to rise to the level of actionable misrepresentations under the DTPA.") (citations omitted).

Therefore, Petitioners cannot recover on any of their misrepresentation claims, whether they are framed as fraud, breach of warranty, or violations of the DTPA, if the pre-sale statements upon which they rely are nothing more than "puffing." Based on the record presented by Petitioners, there is no actionable claim here.

B. References to an "Excellent" Product Are Classic Puffing.

Calling a product "excellent" is quintessential puffing. That is so because the term "excellent" does not connote any objective fact; it is inescapably subjective. Thus,

except in the most unusual circumstances, liability does not fall on one who characterizes a product as "excellent." *E.g.*, *Barber v. Grande Truck Centre, Inc.*, 2002 WL 31253387, *3 (Tex. App. – San Antonio 2002, pet. denied) (unpublished) (representation that vehicle "was of excellent quality and possessed superior performance and driveability" was "mere puffing" and not actionable); *Humble Nat'l Bank v. DCV, Inc.*, 933 S.W.2d 224, 230-31 (Tex. App. – Houston [14th Dist.] 1996, writ denied) (representations by a banker that the bank had a "tradition of excellence" were mere puffing and lacked the specificity required for a warranty); RESTATEMENT (SECOND) OF TORTS § 542 cmt. e (statements "without specific content or reference to facts" are mere puffing).

The Texas Supreme Court applied the traditional rule regarding "puffing" to similar adjectives in *Prudential Ins. Co. v. Jefferson Assoc., Ltd.*, 896 S.W.2d 156 (Tex. 1995), holding that a plaintiff could not recover based on statements that a commercial property was "superb," "super fine," and "one of the finest little properties in the City of Austin." *Id.* at 163. As the Court explained, the statements in question were "not misrepresentations of material fact but merely 'puffing' or opinion." *Id.* That same rule should govern this case.

To be sure, there are rare cases in which the term "excellent" may go beyond mere puffing. *See Pennington v. Singleton*, 606 S.W.2d 682, 687 (Tex. 1980) (statement that boat and motor were "new" or in "excellent" or "perfect" condition were not merely puffing). But *Pennington* is the exception that proves the rule. There, the seller's characterization of the goods as "excellent" was accompanied by a

statement that they were "like new," suggesting an objectively verifiable fact. In fact, the goods were not "like new," but suffered from significant damage. *Id.* Under those unusual circumstances, the term "excellent" when coupled with other representations of quality might be sufficient to move beyond the field of puffing. But such cases are rare indeed, and this does not appear to be one of them.

Fortunately, Texas precedent provides an ideal contrast for the present case, illustrating the degree of specificity and clarity that is needed to exceed "puffing." In *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486 (Tex. 2001), the Court confronted DTPA claims by farmers against a seed seller based on alleged misrepresentations. The Court exhaustively detailed the alleged misrepresentations, which included numerous and detailed statements about the quality of the product. *Id.* at 502-03. Along with general references to the "excellent" quality of the seed, the Court pointed out that "the Wilkinses' evidence reflects specific representations about Cherokee seed's characteristics and specific representations about how the Wilkinses' crop in particular would perform." *Id.* at 503.

The specificity of the alleged misrepresentations in *Helena Chemical* stands in marked contrast to the generality of the Petitioners' assertions in the present case. Petitioners' claim is limited to a few alleged statements during marketing events (which apparently were not even made to them individually) claiming that "Strongarm was an excellent herbicide to use in West Texas soil for peanuts and weed control." J.A. 152, 157-58; *see also* J.A. 147.

Those alleged statements are classic illustrations of "puffing" under Texas law. They did not include any specific representations concerning the performance of the product in

Petitioners' particular fields, nor did they imply any objective facts. Unlike the exceedingly detailed statements that formed the basis of the claim in *Helena Chemical*, these alleged statements were simply the routine, abstract promotional promises that are made on behalf of every product in the marketplace. Petitioners' complaints about routine marketing statements promoting the "excellent" quality of the product fall squarely within the historical protection for puffing in the marketplace. The term "excellent" is "simply too vague to provide a standard for the jury to use to measure the accuracy of the representation; it is therefore nonactionable." *Bradford v. Vento*, 48 S.W.3d 749, 759 (Tex. 2001).

Petitioners' inability to state viable misrepresentation claims based on alleged off-label statements confirms that the lower courts were correct: Those claims are not materially different from the Petitioners' claims about the contents of the Strongarm label, subjecting them to the same preemption analysis. Pet. App. 16a-17a. Those claims must stand or fall with the Court's resolution of the preemption question.

III. THE ALLEGED POST-SALE STATEMENTS ARE NOT ACTIONABLE.

Finally, Petitioners seek to evade the scope of FIFRA preemption by urging claims based on alleged post-sale promises that Respondent would compensate them for their crop losses. *See* Pet. Br. at 49-50. Respondent acknowledges that these claims are not preempted, but insists that they are without merit. Although the viability of these post-sale claims does not implicate the principal

preemption question presented by this case (and thus does not carry equal importance to *Amicus*) TCC agrees that, as a matter of state law, Petitioners' claims based on the post-sale promises are futile.

Petitioners frame their post-sale claims as fraud, fraudulent inducement, and breach of warranty. *See* Pet. Br. at 49. But Petitioners give no indication that they could establish the essential elements of those claims under Texas law.

To state a fraud claim, Petitioners must prove that they "justifiably relied" on the alleged misrepresentation. *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001). That rule bars any claim for damages based on Petitioners' decision to purchase Strongarm, since it is self-evident that they could not have relied upon post-sale representations in their decision to purchase and use the product. "A representation made after a transaction is complete, no matter how false, cannot give rise to an action for fraud." *Eagle Props., Ltd. v. KPMG Peat Marwick*, 912 S.W.2d 825, 827-28 (Tex. App. – El Paso 1995, writ denied) (citing cases).

Petitioners do not assert any other basis for the reliance element of their fraud and fraudulent inducement claims. By their own admission, Petitioners were in a "terrible bind" once the crops had been planted and the growing season had begun. Pet. Br. at 10. Petitioners have failed to show that they took any action in reliance on the post-sale promises that changed their position during the growing season. Because "proof that a party relied to its detriment on an alleged misrepresentation is an essential element of a fraud claim," *Haase v. Glazner*, 62 S.W.3d

795, 798 (Tex. 2001), any claim for fraud or fraudulent inducement is barred.

Likewise, Petitioners' failure to demonstrate reliance bars any warranty claim. "Though not a fraud-based claim, an express warranty claim also requires a form of reliance." *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997); *see also Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 (Tex. 2002) (discussing the requirement of reliance in express warranty cases under Texas law); *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545, 550 (5th Cir. 2003) (same). Accordingly, Petitioners have no express warranty claim based on the alleged post-sale promises.

These reliance problems illustrate the circularity of Petitioners' allegations about the post-sale statements: They are simply one more attempt to recast Petitioners' label-based complaints in a different light in order to recover damages. The alleged post-sale promise that Respondent would "pay each Counter-Plaintiff for his loss of profit and all other losses and damages," J.A.190, is a free-standing measure of damages. If it were actionable, it would swallow the entire preemption issue. But there is no reason to believe these claims have any independent viability. Each claim suffers from a fundamental liability flaw, independent of their common reliance element, which would foreclose recovery.

Fraud requires specific intent to deceive at the time the false promise is made, *see Formosa Plastics Corp. U.S.A. v. Presidio Engineers & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998), but there is no suggestion in this case that the alleged post-sale promises were made with any intent to deceive. Disgruntled litigants can easily

allege fraud simply by inventing a supposed promise and citing a defendant's failure to honor it as "proof" of fraudulent intent, putting the defendant to a Hobson's choice: Denial of the existence of the promise in the first place becomes "proof" of fraudulent intent. To guard against such opportunistic claims, Texas law requires proof of intent to defraud at the time the promise was made in addition to failure of performance. *Id.* (holding "the mere failure to perform a contract is not evidence of fraud"). Bare allegations of fraud based on nothing more than a failure to perform an alleged promise, like the Petitioners' assertions in this case, do not state a claim for fraud. *See, e.g., Schindler v. Austwell Farmers Co-op.*, 841 S.W.2d 853, 854 (Tex. 1992).

Likewise, Petitioners' fraudulent inducement and express warranty claims fail on their own terms. Petitioners do not suggest that the alleged post-sale promises formed a new contractual relationship between the parties, nor do they allege that these promises formed the basis of the initial bargain. As a matter of Texas law, there can be no fraudulent inducement claim based on a promise that does not ripen into a contract. Fraudulent inducement is "a particular species of fraud that arises only in the context of a contract and requires the existence of a contract as part of its proof." *Haase*, 62 S.W.3d at 798. Similarly, express warranties arise only when a seller makes a promise that forms a "basis of the bargain." TEX. BUS. & COM. CODE § 2.313(a)(1). It is difficult to understand how the alleged post-sale promises could be considered warranties, since they plainly did not form a "basis of the bargain." *Amicus* is unaware of any Texas decision that has adopted such a theory, and it is plainly inconsistent with the requirement of reliance in Texas law. *See*

Compaq Computer Corp. v. LaPray, 135 S.W.3d 657, 675-77 (Tex. 2004).

For all of these reasons, Petitioners' claims for fraud, fraudulent inducement, and breach of warranty based on their allegations of post-sale representations are not viable under Texas law. Those claims appear to be a final manifestation of Petitioners' creative efforts to recast their label-based claims into a form that can escape FIFRA preemption. They may succeed in avoiding FIFRA preemption for these post-sale claims, but it will be an empty victory.

CONCLUSION

The Court should affirm the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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TEX. CIV. PRAC. & REM. CODE § 82.001 – Definitions

In this chapter:

(1) "Claimant" means a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant.

(2) "Products liability action" means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

(3) "Seller" means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.

(4) "Manufacturer" means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.

* * *

TEX. CIV. PRAC. & REM. CODE § 82.005 – Design Defects

(a) In a products liability action in which a claimant alleges a design defect, the burden is on the claimant to prove by a preponderance of the evidence that:

(1) there was a safer alternative design; and

(2) the defect was a producing cause of the personal injury, property damage, or death for which the claimant seeks recovery.

(b) In this section, "safer alternative design" means a product design other than the one actually used that in reasonable probability:

(1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and

(2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge.

(c) This section does not supersede or modify any statute, regulation, or other law of this state or of the United States that relates to liability for, or to relief in the form of, abatement of nuisance, civil penalties, cleanup costs, cost recovery, an injunction, or restitution that arises from contamination or pollution of the environment.

(d) This section does not apply to:

(1) a cause of action based on a toxic or environmental tort as defined by Sections 33.013(c)(2) and (3); or

(2) a drug or device, as those terms are defined in the federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 321).

(e) This section is not declarative, by implication or otherwise, of the common law with respect to any product and shall not be construed to restrict the courts of this state in developing the common law with respect to any product which is not subject to this section.